

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Applications of)	
)	
COMMCO TECHNOLOGY, LLC,)	
DEBTOR AND DEBTOR-IN-POSSESSION)	
)	
For Renewal of Authorizations)	
For 39 GHz Facilities)	
)	
Station WMT808)	File No. 0000351676
Norfolk, Virginia)	
)	
Station WMW531)	File No. 0000351289
Mt. Lassen, California)	

MEMORANDUM OPINION AND ORDER

Adopted: March 22, 2002

Released: March 27, 2002

By the Deputy Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. The Public Safety and Private Wireless Division (Division) has before it a petition to deny (Petition) filed by TRW, Inc. (TRW) on April 10, 2001. The Petition requests that the Division deny the above-captioned applications requesting renewal of Commco Technology, LLC's, Debtor and Debtor-in-Possession (Commco) authorizations to operate systems in the 38.6-40.0 GHz band (39 GHz band). For the reasons discussed below, we dismiss TRW's Petition and grant Commco's applications.

II. BACKGROUND

A. Microwave Licensing Framework

2. Prior to August of 1996, Point-to-Point microwave services were licensed under Part 21 while POF services were licensed under Part 94 of the Commission's Rules. Under Part 21, licenses were issued for a period up to ten years.¹ Licensees who received authorizations under Part 21 received eighteen months to construct their facilities.² Under Part 94, generally, licenses were issued for a term of

¹ See 47 C.F.R. § 21.45 (1995)(Point-to-Point Microwave Radio stations licenses issued for a period not to exceed 10 years. Unless otherwise specified by the Commission the expiration of regular Point-to-Point Microwave licenses was on February 1 in the year of expiration.

² See Reorganization and Revision of Parts 1, 2, 21, and 94 of the Rules to Establish a New Part 101 Governing Terrestrial Microwave Fixed Radio Services, WT Docket No. 94-148, *Report and Order*, 11 FCC Rcd 13449, 13463-4 ¶ 31 (*Part 101 R&O*).

five years from the date of original issuance, modification, or renewal.³ Licensees who received authorizations under Part 94 received twelve months to construct their facilities.⁴

3. Effective August 1, 1996, the Commission consolidated the microwave licensing rules under Part 101 of the Commission's Rules. As a result of this consolidation, the Commission adopted a ten-year license term for all Part 101 licensees beginning with licenses issued on August 1, 1996.⁵ Thus, POF licenses issued before August 1, 1996 were issued with an expiration date of February 1, 2001. POF licenses issued beginning August 1, 1996 received ten-year license terms. In addition, the Commission adopted an eighteen-month construction period for all Part 101 licenses.⁶ As a result, Part 101 licensees were required to construct and place in operation each station authorized under Part 101 within eighteen months of the initial date of license grant.⁷ Consequently, Part 101 licensees with a February 1, 2001 license expiration date had eighteen months to construct and place in operation one station per license area.

4. In 1997, the Commission adopted a renewal expectancy and modified the performance requirements for 39 GHz band microwave licensees.⁸ Specifically, the Commission required 39 GHz band licensees to demonstrate "substantial service" in its license area in connection with its application for license renewal.⁹ Although the Commission declined to exempt the incumbent 39 GHz band licensees from the "substantial service" renewal standard,¹⁰ the Commission sought to provide 39 GHz licensees with a significant degree of flexibility in meeting their performance requirement.¹¹ The Commission was concerned that an inflexible performance requirement might impair innovation and unnecessarily limit the types of service offerings 39 GHz licensees can provide.¹² Thus, the Commission determined that permitting licensees to demonstrate that they are meeting the goals of a performance requirement with a showing tailored to their particular type of operation avoids this pitfall.¹³

5. The Commission also noted that licensees must receive a reasonable amount of time to establish a viable operation, develop market plans, secure necessary financing, develop and incorporate new technology in their systems, accommodate equipment manufacturers' production schedules and build a customer base to meet a performance requirement.¹⁴ Although the Commission rejected several proposals as restrictive, burdensome and unnecessarily limiting licensees' service options,¹⁵ the

³ See 47 C.F.R. § 94.39(a) (1995)(A shorter term of one to five years could be applied to permit the orderly scheduling of renewal applications).

⁴ *Part 101 R&O*, 11 FCC Rcd at 13463-4 ¶ 31.

⁵ See Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rulemaking*, 12 FCC Rcd 18600, 18620-18621 ¶ 36 (1997) (*39 GHz R&O*).

⁶ *Part 101 R&O*, 11 FCC Rcd at 13464 ¶ 33.

⁷ See 47 C.F.R. § 101.63(a) (1996); See also *39 GHz R&O*, 12 FCC Rcd at 18622 ¶ 39.

⁸ See *39 GHz R&O*, 12 FCC Rcd at 18626 ¶ 49.

⁹ See 47 C.F.R. § 101.17.

¹⁰ See *39 GHz R&O*, 12 FCC Rcd at 18624 ¶ 46.

¹¹ *39 GHz R&O*, 12 FCC Rcd at 18624 ¶ 42.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 18625 ¶ 47 – 48.

¹⁵ *Id.* at 18623-24 ¶ 43 – 45.

Commission provided an example of a substantial service showing for a traditional point-to-point microwave licensee. The Commission provided a “safe harbor” example of a substantial service showing as “four links per million population within a service area.”¹⁶ Finally, the Commission noted that “any build-out standard should be based on market population or population density because market size is a reasonable proxy for gauging the appropriate comparative levels of spectrum use.”¹⁷

B. 39 GHz Renewal Applications

6. As noted above, the authorizations of POF 39 GHz band licensees expired on February 1, 2001. Renewal applications were filed within ninety days, but not later than thirty days prior to the end of the license term.¹⁸ The Division recently granted 333 renewal applications for 39 GHz band licenses that expired on February 1, 2001.¹⁹ In granting those applications, the Division considered whether the licensees satisfied the 39 GHz safe harbor example. As previously noted, the Commission provided “four links per million population within a service area” as the 39 GHz safe harbor. The Division found that the population base in some markets was substantially smaller than the one million people used by the Commission in its substantial service example. Thus, the Division deduced that substantial service was provided if the licensee was operating at least one link for each 250,000 people located within its service area.²⁰

7. On March 13, 1995 and November 30, 1995, respectively, Commco was issued licenses for 39 GHz Stations WMT808, located in the area of Norfolk, Virginia, and WMW531, located in the area of Mt. Lassen, California. On January 31, 2001, Commco filed renewal applications for its stations WMT808 and WMW531.²¹ In accordance with Section 101.17 of the Commission’s Rules, Commco attached its substantial service showing to the subject renewal applications.²² Commco’s applications were accepted for filing on February 7, 2001.²³ In its renewal application for Station WMT808, Commco

¹⁶ We note that although the Commission did not use the exact words “safe harbor” in the 39 GHz context, we believe the Commission intended for this example to serve as an example of a “safe harbor.” This determination is consistent with similar examples the Commission has provided to licensees in other services. Amendments to Parts 1, 2, 87, and 101 of the Commission’s Rules to License Fixed Services at 24 GHz, WT Docket No. 99-327, *Report and Order*, 15 FCC Rcd 16,934, 16951-2 ¶ 38 (2000); Amendment of Part 95 of the Commission’s Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, WT Docket No. 98-169, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497, 1537-38 ¶ 70; Amendment of the Commission’s Rules Concerning Maritime Communications, PR Docket No. 92-257, *Third Report and Order and Memorandum Opinion and Order*, 13 FCC Rcd 19,853, 19870 ¶ 34 (1998); Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5 – 30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92-297, *Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking*, 12 FCC Rcd 12,545, 12660-1 ¶ 270 (1997); Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service, GN Docket No. 96-228, *Report and Order*, 12 FCC Rcd 10,785, 10843-4 ¶ 113 (1997).

¹⁷ *Id.* at 18624 ¶ 44.

¹⁸ See Appendices A and B. See also 47 C.F.R. § 101.13(d).

¹⁹ See Wireless Telecommunications Bureau Grants 333 Renewals in the CF Radio Service, *Public Notice*, 16 FCC Rcd 7195 (WTB 2001).

²⁰ *Id.*

²¹ See FCC File Nos. 0000348485 and 0000348492, filed January 29, 2001.

²² See 47 C.F.R. § 101.17.

²³ See Public Notice No. 769 (rel. Feb. 7, 2001).

demonstrated that it constructed six links in its service area, which contains a population of 1,511,187. In its renewal application for Station WMW531, Commco demonstrated that it constructed one link in its service area that contains a population of 341,006. On March 29, 2001, TRW was granted licenses for the Redding, California and Salisbury, Maryland Economic Areas.²⁴

III. DISCUSSION

8. Our review of the pleadings has identified three issues for resolution. Specifically, we must determine whether TRW's Petition was timely²⁵ and whether TRW has standing to file a Petition.²⁶ Additionally, we must determine whether Commco is providing substantial service in its service areas.²⁷

9. Petitions to Deny must be filed within thirty days of placement of the application on public notice.²⁸ The deadline for filing petitions to deny against Commco's applications was March 9, 2001. While petitions to deny Commco's applications were due on March 9, 2001, TRW did not file its petition until April 10, 2001. Consequently TRW's petition is untimely.

10. In this case, on March 9, 2001, TRW lacked standing to file a petition to deny because it was a mere applicant for the Redding, California EA and Salisbury, Maryland EA licenses. Ordinarily, applicants can not establish standing to protest a Commission action that may be adverse to their interests.²⁹ However, when the Commission granted TRW licenses for the Redding, California and Salisbury, Maryland Economic Areas, TRW acquired standing to file a petition to deny. As the Commission has noted, in a long line of cases, Section 309(d)(1) of the Communications Act, as amended, only allows a "party in interest" to protest an application before the Commission.³⁰ In some limited situations, however, an applicant for a license during most of the period for filing a petition to deny an application, which becomes a licensee just prior to final Commission action on the application, can have standing to oppose the application. In these situations, the Commission has ruled that because insufficient time existed for the new licensee to file a pre-grant opposition, it will accept a petition for reconsideration of the grant.³¹ Accordingly, TRW's recourse is to file a petition for reconsideration.

11. We now turn to the question of whether Commco has demonstrated the provision of a substantial level of service in the subject service areas. As a preliminary matter, we note that although

²⁴ See The Wireless Telecommunications Bureau Announces the Grant of 100 Wireless Licenses to Operate in the 38.6-40.0 GHz Band, *Public Notice*, 16 FCC Rcd 7195 (WTB 2001).

²⁵ Opposition at 2.

²⁶ See Petition at 2-3, and Reply at 2-3.

²⁷ See Petition at 4-6.

²⁸ 47 C.F.R. § 1.939. See *Minnesota PCS Limited Partnership, Memorandum Opinion and Order*, 17 FCC Rcd 126, 127-8 ¶ 5 (WTB CWD 2002); *AGS Telecom, Inc., Memorandum Opinion and Order*, 16 FCC Rcd 18445, 18446 ¶ 4 (WTB PSPWD 2001).

²⁹ See *KIRV Radio, Memorandum Opinion and Order*, 50 FCC 2d 1010 ¶ 2 (1975) ("the claim of potential economic injury by a mere applicant for a broadcast facility is too remote and speculative to show standing as a 'party in interest'"); see also *Butte County Cellular License Corp., Memorandum Opinion and Order*, 8 FCC Rcd 7894 (1993).

³⁰ See 47 U.S.C. § 309(d)(1). See also *Cel Tel Communications, Memorandum Opinion and Order*, 16 FCC Rcd 16019, 16021 ¶ 5 (2001); *Black Crow Wireless, LP, Order*, 16 FCC Rcd 15643, 15644-45 ¶ 4 (2001); *Northcoast Communications, Order*, 16 FCC Rcd 15637, 15639-40 ¶ 4 (2001).

³¹ See *West Michigan Telecasters, Inc., Memorandum Opinion and Order*, 11 FCC 2d 549, 549-550 ¶ 3 (1968).

Commco had a five-year license term, it did not have a full five years to comply with the substantial service requirement. Because the 39 GHz band substantial service rules did not take effect until April 7, 1998,³² Commco had approximately thirty-four months to comply with the substantial service requirement. Thus, Commco had less than one-third of a ten-year full license term to satisfy the substantial service requirement. Accordingly, we believe we must evaluate the substantial service submissions for these markets in light of the reduced amount of time that Commco received to comply with the substantial service requirement.

12. In the thirty-four months Commco operated these stations under the substantial service standard, it established viable operations, developed market plans, secured necessary financing, accommodated equipment manufacturers' production schedules and built a customer base in each market supporting a system of at least one link per 125,000 population. Commco is operating at over 50% of the Commission example of one link per 250,000 population.³³ Accordingly, we believe that its provision of this level of service within the truncated license period demonstrates that Commco is satisfying the Commission's concern that it use the spectrum to provide service to the public.³⁴ We therefore believe that Commco has successfully demonstrated the provision of a substantial level of service in the subject areas. Accordingly, we find that Commco has demonstrated substantial service in accordance with Section 101.17 of the Commission's Rules, thus warranting renewal of its current authorizations.

IV. ORDERING CLAUSES

13. IT IS ORDERED that, pursuant to Sections 4(i) and 309 of the Communications Act of 1934 as amended, 47 U.S.C. §§ 154(i), 309(d), and Section 1.939 of the Commission's Rules, 47 C.F.R. § 1.939, the Petition to Deny filed by TRW, Inc. on April 10, 2001, IS DISMISSED.

14. IT IS FURTHER ORDERED that, pursuant to Sections 1.949 and 101.17 of the Commission's Rules, 47 C.F.R. §§ 1.949, 101.17, renewal applications filed by Commco Technology, LLC, Debtor and Debtor-in-Possession, FCC Nos. 0000351676, 0000351289, SHALL BE GRANTED.

15. This action is taken under delegated authority granted pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Ramona E. Melson
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Wireless Telecommunications Bureau

³² Service and Auction Rules for the 38.6-40.0 GHz Frequency Band, *Report and Order*, ET Docket 95-183, PP Docket 93-253, 63 Fed. Reg. 6079 (1998).

³³ See Renewal of Licenses to Provide Microwave Service In the 38.6 – 40.0 GHz Band, *Memorandum Opinion and Order*, DA 02-551, rel. March 7, 2002, (WTB 2002) ¶ 10.

³⁴ 39 GHz R&O, 12 FCC Rcd at 18622 ¶ 39.